

Ex Parte Comments of

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In the Matter of

Protecting and Promoting the Open Internet, GN Docket No. 14-28

Preserving the Open Internet, GN Docket 09-191

Framework for Broadband Internet Service, GN Docket 10-127

February 6, 2015

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

RE: Protecting and Promoting the Open Internet, GN Docket 14-28; Preserving the Open Internet, GN Docket 09-191; Framework for Broadband Internet Service, GN Docket 10-127

Dear Ms. Dortch:

Subsequent to my earlier filings in the above-captioned matters, I published articles that bear

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directly on the scope and nature of the agency's on-going Open Internet proceedings.² These articles are attached as Appendices to this letter.

The first article describes the unfortunate process by which advocates whose long-term goal has always been to convert Internet access into a public utility systematically misrepresented the agency's 2014 Open Internet NPRM as a proposal to "end" or "kill" net neutrality. In fact, had the agency followed its original and legally-defensible course, the result would have been "to codify a potent version of it in a legally-enforceable form."

This week, Chairman Wheeler has made clear that under pressure from the White House, he has now definitively reversed his earlier determination to rely in the rulemaking on authority from Section 706 as "invited" in the *Verizon* court's opinion,³ and will now move forward with an attempt at "reclassification" of broadband Internet access services under Title II.

Beyond what the Chairman (and previous Chairmen) have long acknowledged to be the severe legal risks of pursuing that course against certain court challenges, the article's admonitions about the risks to the entire Internet ecosystem of public utility treatment have this become all the more urgent.

The pursuit of such a dangerous and uncertain course seems especially hard to justify on public policy grounds in light of the introduction of legislation in the opening days of the new Congress that would enact Open Internet protections that go well beyond the 2010 rules largely voided by the *Verizon* court. As I write in the second attached article,

The proposed law is short and sweet. It grants the FCC authority to enforce tough new limits on how ISPs manage network traffic, directly addressing the kinds of practices both the agency and the White House have argued could, if implemented by ISPs in the future, threaten the continued success of the U.S. Internet.

² Larry Downes, *The Biggest Net Neutrality Lie of All*, FORBES.COM, July 17, 2014, available at <http://www.forbes.com/sites/larrydownes/2014/07/17/the-biggest-net-neutrality-lie-of-all/>; Larry Downes, *Eight Reasons to Support Congress's Net Neutrality Bill*, THE WASHINGTON POST, January 20, 2015, available at <http://www.washingtonpost.com/blogs/innovations/wp/2015/01/20/eight-reasons-to-support-congress-net-neutrality-bill/>.

³ *Statement by FCC Chairman Tom Wheeler on the FCC's Open Internet Rules*, Feb. 19, 2014, available at <http://www.fcc.gov/document/statement-fcc-chairman-tom-wheeler-fccs-open-internet-rules> ("In its *Verizon v. FCC* decision, the United States Court of Appeals for the District of Columbia Circuit invited the Commission to act to preserve a free and open Internet. I intend to accept that invitation by proposing rules that will meet the court's test for preventing improper blocking of and discrimination among Internet traffic, ensuring genuine transparency in how Internet Service Providers manage traffic, and enhancing competition....The D.C. Circuit ruled that the FCC has the legal authority to issue enforceable rules of the road to preserve Internet freedom and openness. It affirmed that Section 706 of the Telecommunications Act of 1996 gives the FCC authority to encourage broadband deployment by, among other things, removing barriers to infrastructure deployment, encouraging innovation, and promoting competition.").

At the same time, it would cleanly resolve the long-running conflict between the agency and the federal courts, who have rejected two earlier net neutrality efforts from the FCC on the ground that Congress never delegated oversight of broadband ISPs to the agency.

Given the unassailable success of nearly twenty years of “light touch” Internet regulation, all without any specific or enforceable Open Internet rules, there would seem to be little danger in allowing Congress time to resolve the agency’s long-standing jurisdictional dilemma. Doing so would mean inserting precisely the rules the Chairman, the White House, and net neutrality advocates have called for directly into the Communications Act.

Resistance to this common-sense and definitive solution to the Open Internet problem provides further evidence that enforceable rules have never been the true goal of those most vocally pursuing them.

So far, unfortunately, the Commission has not given any deference to Congress on this matter, and seems determined to vote on the Chairman’s proposed Report and Order later this month.

Given the legal risks and uncertainties of certain litigation, and the potential negative impact the process, regardless of its outcome, will have on future investment in infrastructure and the remarkable engine of innovation that has characterized the Internet ecosystem since its emergence as what those of us in Silicon Valley know as a “Big Bang Disruption⁴,” I strongly urge the Commission to step back from the brink. Let cooler heads among the agency’s expert staff bring these proceedings back to reality.

Respectfully submitted,



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Attachments

⁴ See Larry Downes and Paul Nunes, BIG BANG DISRUPTION: STRATEGY IN THE AGE OF DEVASTATING INNOVATION (Portfolio 2014).

Appendix I

Forbes

[Larry Downes](#) Contributor

[Tech](#) 7/17/2014 @ 3:05AM 19,984 views

The Biggest Net Neutrality Lie of All

This week, filings are flooding into the FCC about its latest effort to pass “net neutrality” rules, the first phase of public comments on the proposal that will continue for the next several months. So many comments were submitted yesterday, the original deadline for this round, [that the FCC’s antiquated website crashed](#), forcing the agency to extend the deadline until Friday. (Supply your own smarmy metaphor.)

Of nearly a million comments filed, most will unfortunately prove to be of little value to the agency’s staff as it proceeds with the carefully-proscribed process of federal rulemaking. Consider a few truly random examples: “I, a tax paying, employed, registered voter DEMANDS net neutrality.” “This horrid stance is leading this country into another civil war and it seems you people are too stubborn or dumb to see it.” “If you can’t see your job as anything but a blowjob to Big Telecom then how about resigning?”

But there’s another reason most of the consumer comments, many of them admirably trying to defend the concept of the open Internet, are off the mark. Most of those commenting have been lured into participating by a series of carefully-orchestrated lies about what the FCC is actually proposing to do.

These include lies about what the new rules say, about the kinds of practices they will or will not cover, and about FCC Chairman Tom Wheeler’s reasons for proposing them. (A future post will go into more excruciating detail. Stay tuned.)

Each of these lies has been built on top of the others, and all in the service of the biggest lie of all—a recycled whopper that the Internet “as we know it” is at death’s door, and that the only way to save it is to transform it into a public utility.

Utility regulation—or perhaps outright nationalization of the largest ISPS—is once again being touted as the panacea for everything that currently (or, more often, in the future might) ails the Internet economy. Limited choice of broadband providers? Netflix streaming too slow? The failure of older Americans to see the value of using the Internet? Poor customer service? Turn the Internet into a public utility, and all of it goes away.

What's more, the lie continues, the FCC can do it easily if only it had the political will, and then efficiently and surgically apply the same kind of oversight by federal and state agencies that has long been applied, with unquestioned success, to our electricity, water, power and telephone networks, as well as other national infrastructure including highways, bridges, and the post office. (What's left of the old switched telephone network is regulated under Title II of the Communications Act, which the public utility enthusiasts want to resuscitate and apply to the Internet. Hence the battle cry for "Title II".)

[This public utility lie is an old chestnut](#), going back well over a decade. But this time around, its proponents have managed to convince earnest consumers, start-up executives, and much of the press that transforming Internet access into a utility is not only their one-stop cure, but also their only hope.

Yet instead of doing the right thing, the big lie now warns, Chairman Wheeler and his two Democratic colleagues, over the objections of the FCC's two Republicans, voted to *end* net neutrality and "the Internet as we know it" by proposing new rules that would "authorize" ISPs to sell prioritized last-mile treatment (or "fast lanes") to whichever content providers—Google, Amazon, Facebook—can be forced pay for it by "monopoly" broadband providers.

Entrepreneurs and start-ups who can't afford paid priority would be left behind, unable to reach users who wanted to access their content and services and, therefore, unable to compete with the incumbents. The Open Internet would not be shored up by the proposed rules—it would be unceremoniously terminated.

Those who took the bait swallowed hard. A month before the proposal was actually released, for example, *The Verge* declared, "[FCC Proposal Would Destroy Net Neutrality](#)." On the day of the vote, still prior to the proposal becoming public, Minnesota Senator Al Franken warned of the "[The Beginning of the End of the Internet as we Know it](#)." And just after the vote, *The Huffington Post* even went so far as to retitle a Reuters story to "[FCC Votes for Plan to Kill Net Neutrality](#)." (The story ran on Reuters with the headline: "[Amid protests, U.S. FCC proposes new 'net neutrality' rules](#)".)

What the Proposal Really Says

We need to work backwards to understand how we got into the mess we're now in. Significantly, most of the outrage—much of it directed personally at Wheeler, who was only recently appointed FCC Chair by President Obama, who suspiciously remains committed both to net neutrality and to the Chairman—occurred before the FCC proposal was ever made public, after word that a draft was in the works [was mysteriously leaked from inside the FCC](#).

Despite efforts by the Chairman to make clear his new rules would *extend* the FCC's oversight over ISPs, rage continued to build, heading dangerously toward farce. The day the Commission voted to move forward with the rulemaking, for example, [I appeared on Bloomberg TV](#), where a

representative of Common Cause proudly proclaimed that “millions of people” had already condemned the proposal—a proposal not one of them had seen, let alone read.

Yet once the proposal was actually released, it was clear to anyone who bothered to read it that Wheeler’s plan was anything but the radical deconstruction of the Open Internet its opponents claimed it to be.

For one thing, the proposed new rules are nearly identical to those the FCC proudly passed in 2010, but which a federal appellate court largely voided on procedural grounds. (Indeed, many, though not all, of the groups now fervently opposing the 2014 version supported the 2010 version.)

The 2010 rules, recall, were written in response to still another court ruling, which held that the agency’s informal Open Internet policy statement (the FCC never uses the phrase “net neutrality”) was not enforceable.

After a year of what at the time seemed like rancorous debate but which now seems positively parliamentary compared to the free-for-all of the last few months, the agency passed rules that outlawed ISPs, with important exceptions, from intentionally blocking user’s access to legal Internet content, and from practicing “unreasonable discrimination” in traffic management technologies. (A third rule, requiring more detailed disclosures of traffic management practices, survived the challenge.)

The only difference between the 2010 and 2014 rules is a single change in language made to comply with the court’s decision. Where the 2010 version states that ISPs “shall not unreasonably discriminate in transmitting lawful network traffic over a consumer’s broadband Internet access service,” the 2014 rule says that ISPs “shall not engage in commercially unreasonable practices.”

To the extent there is a debate about the merits of Wheeler’s proposal, that’s the only difference. A prohibition on “unreasonable discrimination” becomes a prohibition on “commercially unreasonable practices.” The changed wording was necessitated by the court’s admittedly confusing rejection of the 2010 rules. But in practice (that is to say, in terms of how the FCC can enforce the rules) there is no significant business difference between practices that constitute “unreasonable discrimination” and those that are “commercially unreasonable.”

(The new wording comes from rules requiring mobile networks to offer data roaming to each other’s customers on “commercially reasonable” terms, which the same court held in a different case was acceptable language.)

Even if there does turn out in practice to be a difference between the two prohibitions, the new rules clearly do not “authorize” anything, nor do they “undo” any net neutrality rules or laws already in place. Congress has never passed any of several proposed net neutrality bills. And after successive court losses on the previous efforts, there have never been enforceable net neutrality regulations at the FCC to begin with.

In short, there is nothing explicit or implied about “fast lanes” and “slow lanes”—whether to ban them or to allow them. (The FCC acknowledges that even without a ban no ISP has yet to offer paid prioritization.) There is, in short, no great conspiracy to undo the Internet that requires consumers to rise up and save it.

Still, opponents of the new rules continue to claim they put an end rather than a beginning to net neutrality. When pressed to engage the actual proposal, they argue vaguely that somehow the slight difference in wording changes everything. What, after all, is a practice that the FCC would find to be “commercially unreasonable”? (What, for that matter, is a practice that would constitute “unreasonable discrimination”? The 2010 rules explicitly refused to define the term, except to say it meant something different that it does under longstanding antitrust laws, which, in the absence of FCC rules, still apply in full force to ISPs.)

Could an ISP offer Google priority delivery for its packets over those of Yahoo, so long as it makes the same offer to Yahoo and anyone else similarly situated? The doomsayers, predictably, say yes.

For its part, the FCC’s proposal simply asks (repeatedly) for comment on whether or not such a practice should be pre-emptively barred or reviewed on a case-by-case basis for anti-consumer effects. The Chairman, for one, seems to be leaning toward an outright ban.

So is that the big betrayal hidden in Wheeler’s proposal? Well, no. Contrary to another oft-repeated lie, the 2010 version of the same rule rejected an outright ban on paid prioritization, noting instead that depending on how, if ever, such a service was offered, it would “raise significant cause for concern.”

In reality, the final order for the 2014 rules, may wind up being more explicit about prohibiting paid prioritization than the rejected 2010 rules. If so, the 2014 version will not only enforce a stronger version of net neutrality than the supposedly better 2010 rules, but will, for the first time ever, provide the FCC with legally-enforceable net neutrality rules of any kind.

But to tilt once again at windmills, the proposed rules don’t “authorize” paid prioritization, or, for that matter, any other network management practice, whether one that complies or not with the nebulous neutrality principle.

(Whether the Internet’s core architecture was ever “neutral”—a term coined by a legal academic, not a network engineer—is certainly debatable. The 2010 rules, for example, wisely exempted over a dozen long-established and explicitly “non-neutral” practices, including content delivery networks, co-located servers, backbone services, Virtual Private Networks and others.)

Why the Big Lie?

Even since the proposal was published for public comment, almost none of the ardent commentary and media coverage of the 2014 proposal ever mentions the actual text or its modest variation from the far less controversial 2010 version.

Opponents instead continue to repeat the inflammatory rhetoric crafted before the proposed rules were published—and surely they knew all along the gist of Wheeler’s plans to protect, not destroy, the Open Internet by limiting, not extending, ISP practices, as the court invited him to do in January.

[One of the groups leading the campaign](#) to demonize Wheeler, for example, continues to describe the “commercially unreasonable” rule as a “the proposal [that] authorizes Internet service providers (ISPs) to discriminate against content and create slow lanes for all those who don’t pay special fees.”

Notably, they never quote the actual language of the proposed rule, or compare it to the 2010 version. But why engage reality when the fiction seems to be getting you so much farther?

The leaders of the Potemkin-like opposition to the proposed rules know that the FCC is proposing nothing that would “end” net neutrality, but rather to codify a potent version of it in a legally-enforceable form

But that is simply an inconvenient truth. Chairman Wheeler and his fellow Democratic Commissioners must be burned at the stake for a higher cause. Not because their proposed rules “authorize” anything good or bad, in other words, but because without an apocalyptic straw man to beat, there’s no crisis that requires the drastic response of the public utility “alternative.” The new rules must be aimed at “ending” net neutrality, because without that there’s no reason, urgent or otherwise, to save the Internet now, before the FCC acts and it’s too late.

And make no mistake. Transforming the Internet into a public utility is a drastic and dangerous idea. Even if the FCC can navigate the treacherous legal waters necessary to “reclassify” Internet access without authority from Congress to do so (and an unchallenged Supreme Court case [validating the FCC’s long-argued view that Congress never intended otherwise](#)), transforming private ISPs into quasi-governmental utilities would dramatically change the Internet ecosystem, projecting negative unintended consequences up and down the food chain.

As a public utility, every aspect of a company’s business is subject to the review and approval of possibly several regulators—federal, state, and local. Prices and price changes must be approved in advance, following lengthy proceedings. Infrastructure of equal quality must be available to every household in the regulated area. Starting, changing, or retiring a service requires permission.

Worst of all, improvements in technology ([even simply replacing meters](#), in the case of electric utilities) must be justified in often politically-poisoned environments that invite graft and corruption.

And everything takes months if not years to work its way through the system—a system that in California alone costs billions in taxpayer dollars to operate.

That’s why, [as I have noted before](#), regulating an industry as a public utility has always been understood by economists of every political persuasion to be a correction of last resort, to be imposed only when a market is so broken that no less invasive form of regulation can correct it.

To see what Internet access might actually look like if regulated as a utility, look no farther than the [pitiful state of infrastructure that is still public or regulated as a utility](#), which consistently receives failing grades from consumers and engineers alike. Our roads, bridges, power and water systems are crumbling. And these are mature infrastructures, whose basic technologies haven’t changed in decades.

In the last twenty years, meanwhile, Internet access has cycled through several dizzying improvements, going from slow and expensive dial-up to DSL and then to cable and now to fiber and [high-speed mobile networks](#). That level of innovation—and certainly that speed—would have been impossible had Congress not wisely chosen to leave the commercial Internet largely alone from its beginnings.

Elsewhere, the lingering side-effects of inefficient utility regulation are increasingly being exposed by better and cheaper technology alternatives. The semi-private U.S. Postal Service, which has been legally hamstrung in adapting to the sudden disruption of electronic communications, [is now losing over \\$10 billion every year](#); [desperate to offer less](#), not more, service to its customers.

Uber, Airbnb and other “sharing” economy services are fighting for their very survival [against heavily-regulated incumbents](#), who have become complacent with legal protection from new, technology-savvy competitors, leaving them no incentive to innovate at all.

Absent public utility treatment, on the other hand, broadband ISPs have [pumped over a trillion dollars](#) of private capital into building out new wired and mobile networks since 1996. As a result, [according to data](#) from the Department of Commerce, over 95% of Americans can already get high-speed Internet at home, [about as many as have access to indoor plumbing](#). That’s the fastest deployment and adoption ever for a communications technology, giving us, among other things, [more broadband connections than any other country](#) in the world.

Contrast that success to Europe’s highly regulated Internet market, where [most users are stuck with outdated DSL technology](#). (When fiber is available, it’s too expensive to get many takers.)

The Regulator of my Competitor is my Ally

So why, in the face of at the very best a highly uncertain future for broadband under a utility model, are those agitating for it whipping Internet users into a frenzy, and doing so using demonstrably false claims about the FCC's actual proposal?

There are, it seems, several reasons. Some are explicit [in a sincere but naïve belief](#) that a government owned-and-operated Internet would be better and cheaper than the private one.

Others recognize the costs and risks of injecting government deep into the Internet's core architecture, but imagine (with more wishful thinking than evidence) that powerful governments would be more friendly to consumers than powerful corporations. (They have no patience for any middle ground, such as giving Wheeler's rules a chance to work or not.)

Some of the activists are funded by [large incumbent content providers](#), who believe that throwing the ISPs off-balance will improve their own bargaining position but who almost certainly underestimate the risk of being caught up in the same whirlpool.

Many are just going along for the ride. [As I've noted before](#), there's always a risk that Internet freedom fighters can turn unexpectedly into an Internet mob, especially when the information they're provided is incomplete or, as here, wildly inaccurate.

Which makes the continued repetition of the big lie all the more dangerous. Because in the end, even if FCC Chairman Tom Wheeler was truly about to destroy the Internet with new rules restricting ISPS, the public utility alternative is no alternative at all. It is truly the nuclear option.

A cursory look at the sad history of a hundred and fifty years of public utility regulation makes clear that it also no panacea. Indeed, as two former Obama administration experts have pointed out, [a hypothetical ISP would find it easier, not harder](#), to offer last mile prioritization under Title II than under the proposed rules. (They were accused of being traitors to the cause, and their reasonable voices drowned out in the circus-like atmosphere of Wheeler's public execution.)

Whatever the motives of its proponents, the public utility panacea remains the biggest of all net neutrality lies. As it has been all along, it is a solution in search of a problem.

That's no surprise. Panaceas have always been myths. And where the ancient Greeks once sought a universal remedy for all ailments that would prolong life indefinitely, modern medicine no longer imagines such a possibility.

Indeed, doctors confronted with patients who cling to misguided hope from fake cure-alls for all manner of real or psychosomatic conditions have another word for supposed panaceas. They call them placebos.

My new book, co-authored with Paul Nunes, is “[Big Bang Disruption: Strategy in the Age of Devastating Innovation](#)” (Portfolio 2014). Follow me on [Twitter](#) and [Facebook](#) for more on the accident-prone intersection of technology and policy.

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Appendix II

Eight reasons to support Congress's net neutrality bill

By Larry Downes January 20



Sen. John Thune (R-S.D.), above, and Rep. Fred Upton (R-Mich.) have circulated draft legislation that would benefit consumers. (Cliff Owen/AP)

[Late last week](#), Sen. John Thune (R-S.D.) and Rep. Fred Upton (R-Mich.), the chairmen respectively of the Senate and House Commerce Committees, circulated [draft legislation](#) aimed at ending once and for all messy political wrangling over the FCC's proposed open Internet rules, sometimes known as "net neutrality." Hearings on the bill will take place in both chambers Wednesday.

The proposed law is short and sweet. It grants the FCC authority to enforce tough new limits on how ISPs manage network traffic, directly addressing the kinds of practices both the agency [and the White House](#) have argued could, if implemented by ISPs in the future, threaten the continued success of the U.S. Internet.

At the same time, it would cleanly resolve the long-running conflict between the agency and the federal courts, who have rejected two earlier net neutrality efforts from the FCC on the ground that Congress never delegated oversight of broadband ISPs to the agency.

The bill authorizes the FCC to enforce prohibitions against wired and mobile ISPs from blocking users' access to lawful content and devices. It would prohibit future "paid prioritization" deals in which content providers pay to have their traffic delivered to consumers ahead of competitors

and ban intentional degradation or slowing of traffic (“throttling”). And it would require detailed disclosure of network management practices.

Whether the bill can gain enough support from Republicans and Democrats to pass remains to be seen. Sen. Bill Nelson (D-Fla.), the ranking Democrat on Thune’s committee, [said earlier this month](#) that he and Thune had have “talked extensively” about the bill for “several weeks.”

[The Internet Association](#), a leading trade group of major content providers, was quick to [praise the bill](#). But advocates who have long pushed for regulation of the Internet as a public utility such as water and power companies [were predictably critical](#) of Congressional efforts to resolve the current crisis.

Here are the top eight reasons why passage of the bill would most benefit consumers:

1. It grants clear authority

While the need for specific new network management regulations has long been debated (the FCC itself, in its last bite at the apple in 2010, referred to them over a dozen times as “prophylactic” rules), the values of an open Internet, in which users can access the content of their choice, have never been seriously debated. For most Congressional Republicans and Democrats who objected to the FCC’s earlier and current efforts, the real problem all along has been [the agency’s lack of legal authority](#).

Since the early days of the commercial Internet, the bipartisan decision of policy makers starting with the Clinton administration has long been to encourage a vibrant broadband ecosystem through a [“light touch” regulatory approach](#). The wisdom of that policy can be seen in the 20 years of explosive growth and investment in Internet-related businesses, technologies, and infrastructure that followed.

Still, the new law acknowledges concerns over future network management behaviors expressed by many stakeholders and consumers over the last decade, and authorizes the FCC to police all of the potentially harmful practices identified. But by limiting the FCC’s new power, it does so without risking future investment and innovation from ISPs and content providers alike.

2. Avoids legal limbo

By granting FCC new authority through an act of Congress, the bill removes the most contentious aspect of multiple failed efforts by the FCC to appoint itself as the broadband police department: Congress’s intentional decision not to give the agency that power.

In both 2010 and 2014, a D.C. appellate court rejected the FCC’s imaginative efforts to find that authority in obscure sections of federal communications law.

Having failed to win with its eyebrow-raising legal theories, the FCC is left in the current rulemaking with two legally unsound last resorts, including a dangerous maneuver to

“reclassify” the Internet as a telephone service and subject it to public utility rules that date to the 1930’s. Chairman Wheeler had until recently strongly resisted pursuing that course, in part because it was certain to put the new rules into legal limbo that could take a year or more to resolve in the courts. Now, with [growing pressure from the president](#), he appears to have painted himself into the public utility corner.

Implementing the rules by an act of Congress rescues the agency from limbo, avoiding the need for any more costly and time-consuming legal gymnastics in federal court.

3. Checks the power of future FCC chairmen

If the courts accepted the FCC’s now-likely attempt at reclassification, the agency would have had nearly limitless power over the Internet, including the ability to set prices and approve service offerings, regulate business practices of content and service providers, share their power with every state regulator, and insert itself into traffic management negotiations deep in the core of the Internet.

Though Chairman Wheeler has promised to avoid using that authority beyond the enforcement of the specific rules covered in the proposed bill, there would be nothing to stop him or a future FCC chairman from changing their mind. The bill forecloses that possibility by underscoring Congress’s original and wise decision to keep the Internet safe from the old public utility regime.

4. Adds consumer protections well beyond the earlier FCC efforts

The bill puts on a firm legal foundation all of the rules of the FCC’s most recent net neutrality effort in 2010 and those proposed last year. And then some.

For example, the FCC’s rules largely exempted mobile broadband on the understanding that active network management is more difficult for mobile ISPs given limited capacity and fast-growing demand. Some advocates complained about the exceptions, however. For better or worse, the proposed bill applies the same rules to both.

The bill also responds to criticism of the FCC’s previous and current efforts that neither was specific enough about the kinds of network management technologies they considered harmful. It replaces a general prohibition of “unreasonable discrimination” with specific bans on paid prioritization and throttling, the practices advocates and the White House singled out as insufficiently covered in 2010.

By explicitly banning paid prioritization and throttling, the bill addresses precisely the demands made by the most vocal advocates in the on-going rulemaking. Passage of the bill would give the chairman, the president and consumer groups exactly what they said they wanted, and do it without legal risk.

5. Flexible enforcement

The bill directs the FCC to enforce its new powers through case-by-case proceedings using its existing administrative courts and judges. That approach is always preferable when, as here, the goal of legal rules is to future-proof them as much as possible against unknown new technologies and network management imperatives yet to come.

That's because case-by-case proceedings are more flexible and adaptable than passing more rules, which quickly grow obsolete and complicated. The FCC's 2010 rules, for example, exempted over a dozen then-existing network management techniques, including content delivery networks, limited access through game consoles, and co-locating servers with the most frequently requested content, especially video. These technologies were acknowledged to be non-neutral, but also essential to consumers. Flexible enforcement will better protect future innovations certain to come.

6. Recognizes the Internet as a global network

Transforming the Internet into a public utility, even if only to enforce rules the FCC otherwise could not legally sustain, would seriously threaten U.S. credibility in global Internet governance.

In international forums including the United Nations, the United States has been strongly and appropriately critical of interference with the free and open development of broadband Internet by other countries. These include repressive regimes such as China, Russia and Iran, who severely limit access to content and use by their own citizens, and protectionist countries, notably Brazil and the E.U., who try to restrict U.S. content providers or otherwise subsidize local alternatives.

The public utility approach would provide opponents of a free and open Internet ample opportunity to call out U.S. efforts as hypocritical, unnecessarily undermining our authority. Instead, the bill would install specific and largely uncontroversial new limits on network management practices without the need for public utility treatment. The bill sets an example. The FCC's approach establishes a double standard.

7. Preserves a role for the Federal Trade Commission

Under longstanding federal law, companies treated as "common carriers" are exempt from antitrust law. By passing the rules through the proposed bill and closing any potential public utility loophole for the future, the bill preserves the ability of the Federal Trade Commission to continue its active campaign of policing ISP practices, including consumer privacy protections, under antitrust and related law.

If, on the other hand, the FCC proceeds with a rulemaking under its public utility theory, the FTC would be explicitly and permanently out of the picture. Indeed, the existence of these laws and the active engagement of the FTC to enforce them has long been the strongest argument against the need for more specific open Internet rules from the FCC, reflecting a long-running turf battle between the agencies.

8. Ends the endless debate

Bipartisan passage of the bill would resolve a decade-long debate about the open Internet that has, once again, engulfed the FCC and distracted the agency from more urgent business, including finalizing the [long-delayed plans for auctions](#) of badly-needed radio spectrum currently used for broadcast TV. Passage of the bill, at the same time, would allow the Commerce committees to turn their attention back to its review of needed updates and reforms to U.S. communications law started last year.

Those who have already condemned the bill will, no doubt, continue advocating for an FCC that is deeply involved in the inner workings of the broadband ecosystem. For many self-styled consumer advocacy groups, [that has been their stated goal all along](#).

The rallying cry of “net neutrality,” however, resonated emotionally with Internet users who don’t necessarily understand the ins and outs of federal regulatory machinations, and has served as an effective wedge to keep the pressure on lawmakers and regulators alike.

If the bill passes and the net neutrality problem is at last resolved, perhaps we can have a genuine discussion about the merits of the remarkable success of U.S. bipartisan Internet policy since the 1990’s.

This time, however, the debate can be on the merits, not manipulative slogans.

Larry Downes is co-author with Paul Nunes of “[Big Bang Disruption: Strategy in the Age of Devastating Innovation](#)” (Portfolio 2014). He is a project director at the Georgetown Center for Business and Public Policy.